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Wednesday 8 March 2017

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Mercredi 8 mars 2017

Standing Committee on Regulations and Private Bills

Draft report on regulations

Comité permanent des règlements et des projets de loi d'intérêt privé

Rapport préliminaire
sur les règlements



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CONTENTS

Wednesday 8 March 2017

Draft report on regulations	T-77
-----------------------------------	------

1954-1955

1956-1957

1958-1959

1960-1961

1962-1963

1964-1965

1966-1967

1968-1969

1970-1971

1972-1973

1974-1975

1976-1977

1978-1979

1980-1981

1982-1983

1984-1985

1986-1987

1988-1989

1990-1991

1992-1993

1994-1995

1996-1997

1998-1999

2000-2001

2002-2003

2004-2005

2006-2007

2008-2009

2010-2011

2012-2013

2014-2015

2016-2017

2018-2019

2020-2021

2022-2023

2024-2025

LEGISLATIVE ASSEMBLY OF ONTARIO

ASSEMBLÉE LÉGISLATIVE DE L'ONTARIO

STANDING COMMITTEE
ON REGULATIONS
AND PRIVATE BILLSCOMITÉ PERMANENT DES
RÈGLEMENTS ET DES PROJETS DE LOI
D'INTÉRÊT PRIVÉ

Wednesday 8 March 2017

Mercredi 8 mars 2017

The committee met at 0900 in committee room 1.

The Clerk of the Committee (Mr. Christopher Tyrell): Good morning, honourable members. It is my duty to call upon you to elect an Acting Chair. Are there any nominations? Ms. Vernile.

Ms. Daiene Vernile: Chair, I would like to nominate my colleague MPP Grant Crack.

The Clerk of the Committee (Mr. Christopher Tyrell): Does the member accept the nomination?

Mr. Grant Crack: Yes.

The Clerk of the Committee (Mr. Christopher Tyrell): Are there any further nominations? There being no further nominations, I declare the nominations closed and Mr. Crack elected Acting Chair of the committee.

DRAFT REPORT ON REGULATIONS

The Acting Chair (Mr. Grant Crack): Good morning, everyone. Thank you very much for your vote of confidence. I look forward to the proceedings this morning. I'd like to welcome the Clerk, legislative research, Hansard and communications to the committee.

Honourable members, we're here this morning to discuss the draft report on regulations made in the first half of 2016. We're joined today by Ms. Tamara Hauerstock from legislative research, who will be guiding us through the report. I'd like to invite Ms. Hauerstock to start by providing us with an overview of her role in relation to the regulations aspect of the committee's mandate. We will then proceed section by section and will pause after each one to allow for debate or questions.

Ms. Hauerstock, the floor is yours.

Ms. Tamara Hauerstock: Good morning, everyone. We will begin with a quick review of the committee's mandate and process with respect to regulations. In this regard, I'll refer you to the three appendices in the draft report that's in front of you.

Appendix A on page 7 of the report is section 33 of the Legislation Act, 2006. This section requires the committee to examine the regulations with particular reference to the scope and method of the exercise of delegated legislative power. It also specifies that in looking at the regulations, the committee should not have reference to the merits of the policy or objectives to be effected by the regulations or enabling acts. What this means is that

when we are looking at the regulations, what we are looking at is whether the power delegated by the act is being used appropriately. The Legislation Act is stating that we are not looking at the policy framework that has been established by the statute.

Appendix B on page 8 is standing order 108(i). This sets out the specific guidelines to be used in reviewing the regulations. There are nine guidelines, and these are based on legal principles that are well established in many common-law jurisdictions. Over the years, the two guidelines that have been most frequently cited in the committee reports are guidelines (ii) and (iii). Guideline (ii) says that regulations should be in strict accord with the statute conferring of power. This means that there should be authority in the statute to make a regulation. Guideline (iii) provides that regulations should be expressed in precise and unambiguous language. This means that a regulation should be clearly written.

Moving on to page 9 of the draft report, appendix C, we've made a visualization of the regulations review process. Just to quickly take you through that: Once a regulation is made and filed, the lawyers and research officers at the Legislative Research Service read the published regulations to assess compliance with the nine guidelines mentioned. That's shown in step 1 of the visualization. We then flag potential violations of the guidelines and write letters to the ministry legal branches responsible for the regulations in question. That's step 2. We then consider the ministry responses, shown as step 3. In some cases, the ministry will agree with the issues we've raised and we would include that in our reports; in other cases, they would disagree with us. At times, their provided responses would satisfy us that there is in fact no guideline violation. In other cases, we are not satisfied. In that situation, we would include the regulation in the draft report.

Once we have prepared the draft report, it comes before this committee, and that's where we are today. When the committee has reviewed the draft report and finalized it, it will be tabled and copies sent to the ministries affected by any recommendations.

The Acting Chair (Mr. Grant Crack): Are there any questions or comments on Ms. Hauerstock's introduction? There being none, then we will go through the report on a section-by-section basis. Ms. Hauerstock.

Ms. Tamara Hauerstock: If you will turn to page 1 of the draft report, you'll see a heading in the middle of

the page called “Statistics.” We include that in the reports on an annual basis. Since this report covers the regulations made in the first half of the year, those statistics are not here. They will be here in the report for the next half of 2016, which will cover the entire year.

Moving on to the section on regulations reported, following our initial review of the 251 regulations filed in the first six months of 2016, we wrote to seven ministries to inquire about 11 regulations. After considering the responses to our inquiries, we have decided to include two regulations under the committee’s second guideline, which refers to regulations being in strict accord with the statute conferring of power.

Moving to page 2, the first regulation we are reporting here is O. Reg. 226/16, made under the Child Care and Early Years Act, 2014. The act generally requires public consultation before making a regulation, but it does provide an exception where the minister decides that consultation is not required in urgent situations, or if a proposed regulation is of a minor or technical nature.

When we reviewed this regulation, we did not see any indication of either consultation being held or notice of a decision not to hold a consultation being given as required by the act. We inquired about this with the ministry and, in response, the ministry explained that the regulation made was a technical amendment only. But the corresponding notice of the change required by the act—in other words, the notice of the decision not to hold a public consultation—had not been given. They indicated that this oversight has been brought to the attention of the ministry and will be corrected as soon as possible.

What I have noted in the last couple of lines is that, since the ministry has committed to correcting the oversight, I did not include a recommendation in this draft report.

The Acting Chair (Mr. Grant Crack): Ms. French.

Ms. Jennifer K. French: Just so I am clear, the minister can override this, or it doesn’t have to be made public. You said “urgent” or “technical,” or whatever, so in the ministry’s response, they have said it was a technical amendment.

Ms. Tamara Hauerstock: That’s right.

Ms. Jennifer K. French: Okay, so that’s their estimation of this situation. Do you concur that this is indeed just a technical amendment? What constitutes “technical,” not to be too technical about it?

Ms. Tamara Hauerstock: Well, I can’t give a legal opinion on the interpretation of their act but I can say that I wasn’t surprised by the response that the ministry gave.

Ms. Jennifer K. French: I was: that it will be corrected as soon as possible. That surprises me.

Ms. Tamara Hauerstock: I wasn’t surprised with respect to the indication that it was a technical amendment only. The regulation itself is three lines long and—I’m just taking a quick look at it now.

Ms. Jennifer K. French: Yes, because I don’t see it here.

Ms. Tamara Hauerstock: It hasn’t been circulated to the committee but I do have a copy with me, and it just

amends, I believe, some of the documentation that has to be included with an application for assistance. It’s just a change of a document, I believe.

0910

Ms. Jennifer K. French: Then just to follow that up, if I may, I see your recommendation, which is not to make a recommendation at this time because the ministry has said, “Thanks for bringing it to our attention. We’ll correct it.” Is it within the power or scope of this group to ask for confirmation, or as a follow-up that, if and when it is corrected, we are made aware?

I’m just curious to know if, then, that will happen and how we find out. Or do we just keep our eyes tuned to the regulations?

Ms. Tamara Hauerstock: We have in the past sent follow-up letters to say, “Ministry, given report recommended something. Has anything been done in response?”

Ms. Jennifer K. French: But since we’re making a recommendation, is there a way to have that follow-up to find out whether or not the change is indeed made at some point?

The Acting Chair (Mr. Grant Crack): Mr. Clerk.

The Clerk of the Committee (Mr. Christopher Tyrell): Yes, the committee does have the power to follow-up. If it’s the will of the committee to send a letter to the ministry indicated and ask for them to let the committee know when they’ve implemented that change, if that’s the will of the committee, we can definitely do that.

Ms. Jennifer K. French: Cool. I would like to suggest that we do that, then.

The Acting Chair (Mr. Grant Crack): Okay. Thank you very much. Any further questions? Mr. Coe.

Mr. Lorne Coe: Thank you, Chair. Through you to the staff: The oversight has been brought to the attention of the ministry—it doesn’t establish who in the ministry—and it will be corrected as soon as possible.

Generally speaking—I’m bringing this perspective as a civil servant as well, formerly—items like this would go to the deputy minister’s office, and there would typically be a time. Is there a deadline that we can establish in terms of compliance? Because the remedy, as it’s described right now, is open-ended. This narrative, for me, is not intended to be punitive, but I think we need, as a committee, to have some knowledge of when the compliance is due.

As to the point that my colleague to my left made earlier about the follow-up, is it possible through this committee to establish a deadline for a response? Also, at the same time, the recommendation here doesn’t establish who within the ministry, but typically they go to the deputy minister and the deputy minister coordinates the response.

I’ll leave that to your discretion, Chair.

The Acting Chair (Mr. Grant Crack): I think the Clerk has indicated that if it is the will of the committee to move forward in the manner that both Ms. French and yourself have suggested, that would be appropriate.

Mr. Lorne Coe: Thank you, Chair.

The Acting Chair (Mr. Grant Crack): Ms. Vernile.

Ms. Daiene Vernile: We support the request for a letter. However, I would argue against having a timeline. I think that we need to give them an opportunity to respond and to do so in good faith; give them the opportunity and the time that they need in order to draft that letter.

The Acting Chair (Mr. Grant Crack): Further discussion?

As Chair, I'm independent. Is there someone here who would put forward a request that we could get a full consensus on, so that I could actually call for a vote or something like that? Mr. Coe.

Mr. Lorne Coe: Yes, thank you, Chair. Through you, I welcome the discussion. I'll move that a letter be requested from the Ministry of Education outlining by when the recommendation from this committee will be completed.

The Acting Chair (Mr. Grant Crack): Thank you. Is there further discussion on the motion from Mr. Coe? There being none, I shall call for a vote of consensus. All those in favour of a request to send a letter? Those opposed? I declare the motion carried.

I believe that deals with the first regulation that legislative research talked about. Ms. Hauerstock, if you want to move on to the second one.

Ms. Tamara Hauerstock: Okay. The second regulation has a similar type of issue. This is O. Reg. 114/16, made under the Planning Act. Under this act, when a regulation of this type is made, the minister is required "to give notice within 30 days following the making of the order in such manner as the minister considers proper." The act sets out certain information that must be included within that notice.

When we were reviewing this regulation, we did see some notice of the regulation given in the Regulatory Registry and in the Environmental Registry, but it didn't seem to include the information required by the act.

We inquired about this with the ministry, and they did indicate that "through inadvertence, notice required by section 47(5) of the Planning Act was not given in respect of" this regulation.

They indicated that "processes are currently being put into place in order to ensure that notice of future orders are given in accordance with the requirements" of the act, and that "steps are being taken to give proper notice ... in a newspaper of general circulation" with the required information under the Planning Act.

Similarly to the regulation discussed earlier, in light of the corrective steps the ministry is taking, I did not include a recommendation with respect to this regulation.

The Acting Chair (Mr. Grant Crack): Ms. French.

Ms. Jennifer K. French: Just so that I'm clear, it's similar in that there was an obligation or responsibility to make public this regulation. Is that correct?

Ms. Tamara Hauerstock: Yes. It's a different type of notice. It's a public notice—

Ms. Jennifer K. French: Right. It's a public notice after the fact. But they have 30 days to post this notice with newspapers of general circulation—I'm looking at the remedy thing here at bottom, that fourth paragraph.

Am I right in understanding that they did post it, but in the wrong place? Is that what that first paragraph said: that they did voluntarily post a notice, but this notice was not the notice required by the Planning Act?

Ms. Tamara Hauerstock: That's right. They did give a particular kind of notice in what are called the Regulatory Registry and the Environmental Registry, which are registries on the Internet that give notice of various regulations. But that was not the correct type of notice, and it didn't have the specific information mandated by the Planning Act.

Ms. Jennifer K. French: So there is someone who is learning new things who's posting notices, potentially?

Anyway, then my question is, if that original responsibility was attached to a 30-day window—I see here that they're saying that steps will be taken for next time. Are there also going to be steps taken for this particular regulation? I'm not clear on that piece. This particular regulation was posted elsewhere, but not circulated through the channels that another regulation would be next time. This particular regulation: Will it be posted—obviously, outside of the 30-day window—in the manner that they're responsible to post?

Ms. Tamara Hauerstock: Yes, that's my understanding from their response. Both things are true. In other words, they will take steps to make sure that, in the future, it's done correctly from the beginning. With respect to this particular regulation, they indicated that they would be publishing the correct notice with the correct information, as required by the act.

Ms. Jennifer K. French: Then I think, in this case, as in the other, for that follow-up, please let us know. This committee would request that we be kept in their loop. But I think it's fair, in the case, with a 30-day window, to ask that it be remedied in a timely—we're not allowed to push them or tell them what to do, but I think it would be fair to have a timeline on this one.

The Acting Chair (Mr. Grant Crack): Further discussion? Mr. Coe.

Mr. Lorne Coe: Just by way of clarity, Chair, and through legislative research: Has the ad that's referred here been placed already? What's the schedule for the ad to be placed? Your last paragraph on page 3 says, "Steps are being taken to give proper notice." This was written at a point in time. Has the ad been placed? Through you, Chair.

The Acting Chair (Mr. Grant Crack): Ms. Hauerstock?

Ms. Tamara Hauerstock: I don't know whether it has been placed, in fact.

Mr. Lorne Coe: Well, it speaks to the request for the letter. If the ad has already been placed, then the letter is redundant, because the remedy here is the public notice, the ad being placed.

In part, the ministry met the requirement by placing the notice—in my view, at least—on the Environmental

Registry. In cases of planning initiatives like the one we're considering, typically it is done in two ways: It's placed on the Environmental Registry and then an ad is placed in a local geographic area. That meets the test of the Planning Act.

Chair, I think it's important to establish if, in fact, the ad has been placed, if that's possible through staff, through the ministry, because it makes the letter redundant—in my view, at least—if the ad has already been placed.

The Acting Chair (Mr. Grant Crack): Ms. French.

Ms. Jennifer K. French: I take the member's point, but I think, depending on how we decide to craft the letter, that if the letter said, "Please follow up and let us know that this has been accomplished and when," then that would still answer that it has been, and also reminds them to do it if they have yet to post it. Depending on how we word it, there's an opportunity to not be redundant. Yes, I'd hate to be redundant.

0920

The Chair (Mr. Grant Crack): Further discussion? Ms. Vernile.

Ms. Daiene Vernile: We would not object to a letter being written, but again, I would say that having a timeline would be too prescriptive. We should give the ministry the opportunity to write this letter and to do so in good faith, to respond in good faith in their time.

The Chair (Mr. Grant Crack): Further discussion? Once again, I would need to have a proposed motion. Ms. French.

Ms. Jennifer K. French: I move that this committee send a letter to the appropriate office asking for a follow-up that the notice has indeed been posted, or that the question has been answered.

The Chair (Mr. Grant Crack): To the Ministry of Municipal Affairs?

Ms. Jennifer K. French: Please and thank you.

The Chair (Mr. Grant Crack): Further discussion on the motion? There being none, I shall call for a vote. Those in favour? Those opposed? I declare the motion carried.

Further discussion on the report? Ms. Hauerstock, anything else to add?

Ms. Tamara Hauerstock: There are only those two regulations being reported on in this draft report.

On page 4 of the report, there is a brief summary of a case called *Wildlands League v. Ontario*. From time to time, the committee's report includes reports on significant court decisions that relate to regulations, and we felt that this was one. This case is a Court of Appeal decision relating to a regulation made under the Endangered Species Act. The regulation makes exceptions to prohibitions that are found in the act.

The *Wildlands League* and the Federation of Ontario Naturalists argued that the regulation was ultra vires, or, in other words, that it did not fall within the authority of the act. They raised two issues at the Court of Appeal.

The first issue is that the minister had not considered the effect of the proposed regulation on each species at risk and, as a result, had not met a condition for

regulation-making that is set out in the act. The Court of Appeal looked at the explanatory note to the regulation, and concluded that it was evidence that the minister had, in fact, considered the effect of the regulation on the survival of each species at risk, and so the condition for regulation-making had, in fact, been met.

The second argument that was made was that the regulation was inconsistent with the act's purpose of protecting species at risk because the purpose of the regulation "was to save government and industry time and money, and that such purpose is inconsistent with the overarching purpose of the ESA, which is the protection and recovery of SAR." In considering this argument, the Court of Appeal relied on the significant decision of the Supreme Court of Canada in *Katz Group Canada Inc. v. Ontario*. It said that to strike down a regulation as being inconsistent with the statutory purpose, it must be established that the regulation is irrelevant, extraneous or completely unrelated to the purpose of the statute.

The Court of Appeal concluded that while the motive for the regulation may well have been a concern for administrative efficiency and cost savings, the limitations, conditions, exceptions and scoping of the exemptions contained in the regulation are directed toward the protection of species at risk. The regulation could therefore not be said to be irrelevant, extraneous or completely unrelated to the purpose of the Endangered Species Act and its scheme.

Those are the significant points of the Court of Appeal decision. I would just note that an application for leave to appeal has been filed at the Supreme Court.

The Chair (Mr. Grant Crack): Further discussion? Is there anything else, Ms. Hauerstock, that you would like to add?

Ms. Tamara Hauerstock: I think, subject to any questions, that completes my presentation today.

The Chair (Mr. Grant Crack): Members of the committee, any questions or comments? Ms. Vernile.

Ms. Daiene Vernile: Chair, I would just like to offer some concluding remarks, and that is to say that in the first half of 2016, upon which you are reporting, there were 251 regulations that were brought forward by this committee. Within that number, seven ministries were contacted, and there are only two regulations upon which you are reporting now. Keeping that in perspective, I think that, because of your hard work, you found these issues and corrective measures are being undertaken. So we appreciate that. We are thankful for your work. I think it shows that the process is working.

The Acting Chair (Mr. Grant Crack): Further discussion? There being none, I would just like to wrap up by indicating, prior to dealing with the actual report, that there will be two letters sent out to both the Ministry of Education and the Ministry of Municipal Affairs with regard to a plan or obtaining compliance with the proper process.

Ms. French?

Ms. Jennifer K. French: Just a question or clarification: In the past, when we've had other draft reports and other opportunities to send letters of follow-up or

recommendation to various ministries, I don't remember having conversations then with the letters back or the responses back. When can we expect that, or what will that look like, if and when we do hear back from various ministries? In this case, there are two, but in previous opportunities I know we've sent letters out and I'm not remembering, off the top of my head, that they have indeed come back to us. Is there a follow-up to the follow-up to the follow-up that we could do?

The Acting Chair (Mr. Grant Crack): I'm going to defer to the Clerk.

The Clerk of the Committee (Mr. Christopher Tyrell): Yes. As you've indicated, we have sent out letters in the past. We did get some responses back, and those were handed out and exhibited at the meeting following when we got them back. So they would have been exhibited at that meeting.

Ms. Jennifer K. French: I just know that there hasn't been a formal report like this, so I wasn't remembering.

The Clerk of the Committee (Mr. Christopher Tyrell): No, you wouldn't necessarily get those responses to the formal report, but we did bring copies of the letters we received from the ministries to the committee and hand them out to members at that time.

The Acting Chair (Mr. Grant Crack): Ms. Hauerstock?

Ms. Tamara Hauerstock: Just further to that, the practice in recent years has been to report on the responses to the follow-up letters on an annual basis. Similar to the statistics which I mentioned would be included in the end-of-the-year report, the follow-up on the follow-up would also be included in the next report that will come to you, which is the report on the regulations made in the second half of 2016—just a summary of the responses.

Ms. Jennifer K. French: I will wait with bated breath for that report.

The Acting Chair (Mr. Grant Crack): I would imagine.

Final request: Any further questions or comments concerning the new report? There being none, I shall call for votes on the different aspects as we move forward with the report.

Shall the draft report on regulations made in the first six months of 2016 carry? I declare it carried.

Shall the Chair sign off on the final copy of the draft? Carried.

Shall the report be translated? I declare that the report will be translated.

Shall the report be printed? I declare that the report shall be printed.

Before we move forward, shall I report the report to the House? Mr. Clerk?

The Clerk of the Committee (Mr. Christopher Tyrell): Here we have two options: Because the report, as is, that was just carried by the committee doesn't contain any recommendations, we have the option of simply presenting the report to the House or presenting the report to the House and moving its adoption. Presenting to the House is just, "Here's the report for the House." Presenting and moving its adoption would involve the Chair calling for the adjournment of debate, and the report would be put on the order paper, potentially to be called at a later date by the government House leader or whoever. Those are the two options. Those are usually for substantive reports, but because there aren't any recommendations in this, it's really up to the committee to decide how it would like to proceed.

Ms. Jennifer K. French: Just present it to the House, I think.

The Acting Chair (Mr. Grant Crack): Just present it to the House: Is that what I'm hearing, Ms. French?

Ms. Jennifer K. French: Based on my limited understanding of the situation, if it isn't a substantive report with recommendations, I don't see why we would go through all the additional steps. So just to present to the House would be fine with me.

The Acting Chair (Mr. Grant Crack): Mr. Coe?

Mr. Lorne Coe: Yes.

The Acting Chair (Mr. Grant Crack): Any further discussion? Ms. Vernile.

Ms. Daiene Vernile: We would concur—just to present to the House.

The Acting Chair (Mr. Grant Crack): Then I shall ask for the vote. Shall I present the report to the House? Carried. I shall present the report to the House.

Unfortunately, I don't see that there's any further business, so we will have to part. This committee is adjourned.

The committee adjourned at 0930.

[The page contains two columns of extremely faint, illegible text, likely bleed-through from the reverse side. The text is too light to transcribe accurately.]

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